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SUPREME COURT, U.S.**

**IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983**

ROBYN LEROY PARKS,

Petitioner,

83-6453

-v-

STATE OF OKLAHOMA,

Respondent.

**WRIT OF CERTIORARI TO
THE OKLAHOMA COURT OF CRIMINAL APPEALS
PETITION FOR WRIT OF CERTIORARI**

**ROBERT A. RAVITZ
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COUNSEL FOR PETITIONER

I.
QUESTIONS PRESENTED

1. Can a state appellate court consistent with the Sixth and Fourteenth Amendments to the United States Constitution determine effectiveness of counsel in a capital sentencing proceeding without an evidentiary hearing where allegations clearly demonstrate ineffectiveness of counsel on the part of Petitioner's trial counsel?

2. Can a state appellate court consistent with the Sixth, Eighth and Fourteenth Amendments to the United States Constitution adjudge the competency of counsel under a mockery of justice standard without violating petitioner's constitutional rights?

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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

ROBYN LEROY PARKS,

Petitioner,

-v-

STATE OF OKLAHOMA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE OKLAHOMA COURT OF CRIMINAL APPEALS

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Oklahoma Court of Criminal Appeals entered in this case on the 25th day of January, 1984.

OPINION BELOW

The opinion of the Oklahoma Court of Criminal Appeals is an unpublished order. It is annexed as Appendix A to this petition. The order denying petitioner's post-conviction relief application in the trial court is an unpublished order annexed as Appendix B to this petition.

JURISDICTION

The judgment of the Oklahoma Court of Criminal Appeals denying post-conviction relief was entered on January 25, 1984. The trial court had previously denied post-conviction relief on July 8, 1983. This Court previously denied certiorari on petitioner's direct appeal on January 17,

1983, ___ U.S. ___ 103 S.Ct. 800 (1983). The issues addressed in this petition were not addressed in Petitioner's original certiorari petition because the claims of ineffectiveness of counsel required an evidentiary hearing 1/ in counsel's belief. The Oklahoma Court of Criminal Appeals affirmed petitioner's direct appeal in Parks v. State, 651 P.2d 686 (Okla.Cr. 1982). Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

1/ According to footnote number one to petitioner's rehearing petition on direct appeal, counsel's ineffectiveness can not conclusively be demonstrated absent an evidentiary hearing on post-conviction.

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED IN THIS CASE

This case involves the Fourteenth Amendment to the Constitution of the United States which provides, in relevant part:

"...Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any persons within its jurisdiction the equal protection of the laws."

The Sixth Amendment to the United States Constitution provides in relevant part:

"In all criminal prosecutions, the accused shall enjoy the right to have a speedy and public trial, by impartial jury of the state and district wherein the crime shall have been committed...; and to have the assistance of counsel for his defence."

The Eighth Amendment to the Constitution of the United States which provides, in relevant part:

"Excessive bail shall not be required,... nor cruel and unusual punishments inflicted."

This case also involves provisions of the Oklahoma Statutes.

1. O.S. 21 §701.7 Murder in the first degree.

A. A person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof.

B. A person also commits the crime of murder in the first degree when he takes the life of a human being, regardless of malice, in the commission of forcible rape, robbery with a dangerous weapon, kidnapping, escape from lawful custody, first degree burglary or first degree arson.

2. O.S. 21 §701.9 Punishment for murder.

A. A person who is convicted of or pleads guilty or nolo contendere to murder in the first degree shall be punished by death or by imprisonment for life.

STATEMENT OF THE CASE

The petitioner, ROBYN LEROY PARKS, was convicted of murder in the first degree in violation of 21 O.S. 701.7. The jury, after finding the sole aggravating circumstance that the murder was committed to avoid lawful arrest or prosecution, sentenced the defendant to death for this murder. 2/

THE EVIDENCE ON POST-CONVICTION RELIEF

No evidentiary hearing was afforded Petitioner by the District Court on his application for post-conviction relief. The Oklahoma Court of Criminal Appeals assumed all the facts alleged in Petitioner's application for post-conviction relief were true. The Court held Petitioner was not denied effective assistance of counsel at the punishment stage of his bifurcated capital murder trial, despite his attorney failing to put on evidence in mitigation, failing to investigate before trial the facts the State intended to use in order to attain the death penalty and failing to object to prejudicial argument and evidence and despite the fact counsel was physically exhausted as a result of physical illness.

2/ Of the 47 people sentenced to death in Oklahoma as of the time of petitioner's rehearing petition, Petitioner was the sole person sentenced to death with a finding of only this aggravating circumstance, Brief in Support of Petition for Rehearing (September 23, 1982).

HOW THE FEDERAL QUESTIONS WERE
RAISED AND DECIDED BELOW

1. Petitioner requested in his application for post-conviction relief, an evidentiary hearing to determine the effectiveness of his trial counsel for purposes of appellate review on the issue of sentencing. The trial court denied this request holding that petitioner's application failed to show sufficient reason why any of his grounds were not asserted in the direct appeal. The Oklahoma Court of Criminal Appeals did not agree with the trial court's finding of lack of reason for not raising the claims of ineffectiveness of counsel prior to post-conviction relief. However, the court concluded that an evidentiary hearing was not necessary on the claim of ineffectiveness of counsel because assuming the facts as alleged by Petitioner were true, they would not support a claim of effectiveness of counsel.

2. The Oklahoma Court of Criminal Appeals, addressed the merits of the issue of counsel's effectiveness, assessing the effectiveness of counsel without stating what standard they were applying in its opinion. However, the Court of Criminal Appeals cited Stafford v. State, 665 P.2d 1205 (Okla. Cr. 1983) 3/ in assessing counsel's effectiveness. Petitioner had contended on appeal to the Oklahoma Court of Criminal Appeals that he was denied effective assistance of counsel in the punishment stage of his bifurcated trial, in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

3/ In Stafford, the Oklahoma Court of Criminal Appeals judged counsel's competency under the mockery of justice standard stating the reasonably competent standard was to be applied prospectively only.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER AN EVIDENTIARY HEARING IS REQUIRED UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION TO MAKE A DETERMINATION ON EFFECTIVENESS OF COUNSEL WHERE SUFFICIENT ALLEGATIONS DEMONSTRATE INEFFECTIVENESS.

Petitioner was sentenced to death before an Oklahoma County trial jury for the crime of murder in the first degree on a finding of a single aggravating circumstance, the murder was committed to avoid lawful arrest or prosecution. This aggravating circumstance standing alone, has not warranted the death sentence in any other capital murder trial in Oklahoma. (Appendix 1 to Petitioner's petition for rehearing).

Petitioner on rehearing before the Oklahoma Court of Criminal Appeals, contended that the death penalty was imposed under the influence of passion, prejudice and other arbitrary factors. 4/

In the instant case on post-conviction relief, petitioner requested an evidentiary hearing on allegations dealing with the effectiveness of counsel. These included failure to present mitigating witnesses, failure to properly prepare for the punishment stage of the proceeding and the physical illness of defense counsel. Counsel's request for an evidentiary

4/ Counsel contended "at present the record may not conclusively demonstrate constitutionally ineffective assistance of counsel under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the law on competency of counsel as stated by this Court in Johnson v. State, 620 P.2d 1311 (Okla. Cr. 1980) and absent a post-conviction evidentiary hearing, appellate counsel does not believe he can properly litigate the competency of the counsel issue inasmuch as medical records of the attorney who tried the case and the physical condition of the attorney who tried this case and other factors need to be thoroughly developed at an evidentiary hearing."

hearing was necessary to effectively demonstrate prejudice. 5/

An evidentiary hearing in the instant case is necessary to demonstrate the critical area of lack of investigation in the preparation on the part of defense counsel which is a critical means of determining effectiveness of counsel. See United States V. Porterfield, 624 F.2d 122 (10th Cir. 1980).

Effective assistance must include zealous advocacy and informed grasp of the law and facts pertinent to sentencing issues based upon an adequate investigation. See Comment, Adequacy of a Criminal Defense Lawyer's Preparation for Sentencing (1981 Ariz. St. L.J. 585, 608.

From just a review of the trial record in the instant case, it is impossible to show prejudice under whatever standard this Court should decide in Strickland v. Washington absent an evidentiary hearing. Further, the Oklahoma Court of Criminal Appeals holding fails to mention prejudice or lack thereof.

Failure to grant Petitioner an evidentiary hearing rendered any discussion of effectiveness of counsel incomplete. The findings of the Oklahoma Court of Criminal Appeals that counsel was competent absent an evidentiary hearing, is inconsistent with the Sixth and Fourteenth Amendments to the United States Constitution to effective assistance of counsel. This Court should grant certiorari and hold under the Sixth and Fourteenth Amendments that where sufficient allegations demonstrate a claim of ineffectiveness of counsel, a hearing must be had on these allegations to determine their validity and any resulting prejudice.

5/ Petitioner is aware that this Court currently has before it the case of Strickland v. Washington, 82-1554 where one issue involves a determination of what standard of prejudice is required upon a showing of ineffectiveness of counsel. Petitioner in the instant case, believes that either under the standard argued by petitioner or respondent before the Supreme Court in Strickland v. Washington that Petitioner in the instant case would satisfy the requirements.

II.

THIS COURT SHOULD GRANT CERTIORARI TO
DETERMINE THE APPROPRIATE STANDARD FOR
REVIEW OF CLAIMS OF INEFFECTIVE
ASSISTANCE OF COUNSEL.

The Oklahoma Court of Criminal Appeals in the instant case did not state what standard they used in determining that counsel was effective. However, the Court did cite Stafford v. State, 665 P.2d 1205 (Okla. Cr. 1983) as supporting its decision that counsel was effective. In Stafford, the Oklahoma Court of Criminal Appeals applied the mockery of justice standard to determine Stafford's trial counsel's performance despite the fact that the Oklahoma Court of Criminal Appeals adopted the reasonably competent assistance of counsel test approximately three years before. See Johnson v. State, 620 P.2d 1311 (Okla. Cr. 1980). The Oklahoma Court of Criminal Appeals stated in Stafford that the reasonably competent assistance of counsel test was to be applied prospectively only. 6/

This Court is currently faced with determining the correct standard for review of claims of ineffective assistance of counsel. See Strickland v. Washington, 82-1554, 693 F.2d 1243 (5th Cir. en banc). Counsel requests that this Court grant certiorari and reverse the Oklahoma Court of Criminal Appeals for following the sham, mockery of justice standard in

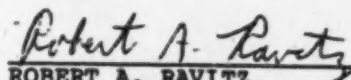
6/ This interpretation appears to be inconsistent with the Tenth Circuit Court of Appeals' interpretation of effectiveness of counsel and the prospective application of said standard. See Runnels v. Hess, 653 F.2d 1364 (10th Cir. 1981) and Gaines v. Hess, 662 F.2d 1371 (1981) requiring the following of the reasonably competent assistance of counsel test to cases tried prior to its enunciation of that standard in Dyer v. Crisp, 613 F.2d 275 (10th Cir. 1980).

determining effective assistance of counsel under the Sixth and Fourteenth Amendments. Assuming the factors the Oklahoma Court of Criminal Appeals assumed as being true in the instant case that (1) the trial attorney was exhausted as a result of physical illness and did not properly prepare for a bifurcated capital murder trial; (2) that the attorney failed to put on evidence in mitigation; (3) the attorney failed to investigate before trial, the facts the State intended to use in order to obtain the death penalty; and (4) the trial attorney failed to object to prejudicial argument and evidence in the second stage, the jury was not allowed to consider, on the basis of all relevant evidence not only why the death sentence should be imposed, but also why it should not be imposed. The jury was not given all possible relevant information about the individual defendant whose fate it had to determine. Lockett v. Ohio, 438 U.S. 586. The Oklahoma Court of Criminal Appeals has effectively abolished the requirement that a criminal defendant receive effective assistance of counsel by virtue of its holding in the instant case. This Court should grant certiorari and reverse the judgment of the Oklahoma Court of Criminal Appeals.

CONCLUSION

For the reasons stated above, the petitioner requests a writ of certiorari be granted.

Respectfully submitted,


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(405) 236-2727, ext. 582

COUNSEL FOR PETITIONER

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JAN 25 1984

Ross N. Lillard, Jr.
CLERK

ROBYN LEROY PARKS,

Petitioner,

-vs-

THE STATE OF OKLAHOMA,

Respondent.

No. PC-83-461

ORDER AFFIRMING DENIAL OF POST-CONVICTION RELIEF

Petitioner was convicted in Oklahoma County District Court, Case No. CRF-77-3159, of Murder in the First Degree and received the death penalty. This Court affirmed that judgment and sentence in Parks v. State, 651 P.2d 686 (Ok1.Cr.1982). On July 8, 1983, the District Court denied Petitioner's application for post-conviction relief based on a finding that he failed to show sufficient reason why his grounds for relief had not been asserted on direct appeal. Petitioner argues that the issues raised in his application are of such a character that they can be properly addressed only with the aid of an evidentiary hearing. He asks that this Court vacate the District Court's denial of post-conviction relief, and remand for an evidentiary hearing.

Of the ten grounds for relief asserted in his application, eight clearly could have been raised on direct appeal. Therefore, we will discuss only the remaining two grounds.

First, Petitioner asserts that, while still a juvenile, he was convicted of a felony without having been certified as an adult. He argues that this "unconstitutional" conviction was used to enhance his punishment. This Court has held that a person seeking to have his present sentence modified after it has been enhanced by a prior invalid juvenile conviction "must be able to state to the District Court some reason to believe that certification would have been denied if a certification hearing had been held." Edwards v. State, 591 P.2d 313, 322-23 (Ok1.Cr.1979). We find no such reason

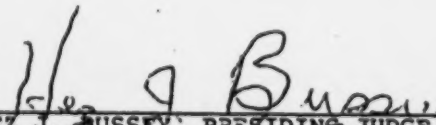
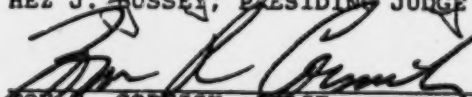
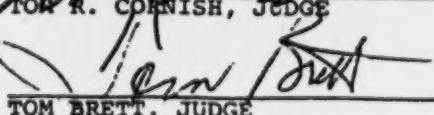
in Petitioner's application or supporting brief. Furthermore, Petitioner's punishment was not enhanced within the meaning of Edwards. Edwards concerns the Second and Subsequent Offenses statute, 21 O.S.1981, § 51, which authorizes increased punishment for recidivists. In Petitioner's case, however, evidence of his allegedly invalid conviction was used, not to enhance punishment, but to rebut testimony as to Petitioner's good character.

Secondly, Petitioner argues that he was denied effective assistance of counsel at the punishment stage of his bifurcated capital murder trial when his attorney failed to put on evidence in mitigation, failed to investigate before trial the facts the State intended to use in order to attain the death penalty, and failed to object to prejudicial argument and evidence. Also, he claims the trial attorney was exhausted as a result of physical illnesses. He argues that at an evidentiary hearing he would be able to produce evidence to support his claims.

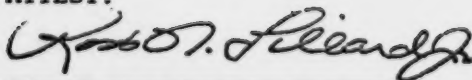
We have carefully reviewed the facts alleged in support of these claims. It is enough to say that, even assuming that the facts are as alleged by appellant, his claim is without merit. Cf Stafford v. State, 665 P.2d 1205 (Okla.Cr.1983).

The order appealed from is AFFIRMED. The request for oral argument is denied.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 25th day of January, 1984.


HEZ J. BUSSEY, PRESIDING JUDGE

TOM R. CORNISH, JUDGE

TOM BRETT, JUDGE

ATTEST:


Clerk

STATE OF OKLAHOMA

ROBYN LEROY PARKS,

Petitioner,

vs.

THE STATE OF OKLAHOMA,

Respondent.

Case No. CRF-77-3159

ORDER DENYING POST-CONVICTION RELIEF

The Petitioner seeks post-conviction relief and sets forth sixteen different grounds for affording the relief which he seeks. The Petitioner is presently incarcerated because of a conviction of a jury trial for the offense of Murder In The First Degree in this case for which he received a sentence of death.

The Petitioner appealed his conviction and the judgment and sentence were affirmed by the Court of Criminal Appeals on the 26th day of August, 1982, in their case number F-79-3. The Petitioner may not now have a second appeal under the mask of a Post-Conviction Application as this is exactly what 22 O.S. Sec. 1086 and Rule 4.1 of the Rules of the Court of Criminal Appeals meant to prevent. Title 22 O.S. Sec. 1051, provides for a direct appeal and the Petitioner may not, thereafter assert error in a piecemeal-fashion under a post-conviction route as this would largely supersede the remedy of appeal and render meaningless the procedure inacted for a regular appeal. Ellington vs. Crisp, 547 P.2d 391 (1976).

The language of the last paragraph was taken almost verbatim from this case.

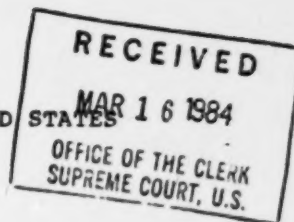
The petitioner's Application failed to show sufficient reason why any of his sixteen grounds were not asserted in the direct appeal and, accordingly, the Application for Post-Conviction Relief is denied on this 7th day of July, 1983, for the reasons stated above.

William S. Myers, Jr.
WILLIAM S. MYERS, JR.

83-6453

CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983



ROBYN LEROY PARKS, Petitioner

ORIGINAL

v.

THE STATE OF OKLAHOMA, Respondent.

ON WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF
CRIMINAL APPEALS

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, ROBYN LEROY PARKS, moves that the Court grant leave for him to proceed in forma pauperis. As grounds for this Motion, the Petitioner would state that he is currently confined in a penal institution and is unable to pay the fees and costs associated with seeking review of this Court. The factual grounds for this Motion are further detailed in the Affidavit of the Petitioner to be filed forthwith.

For the reasons stated, the Petitioner requests that this Motion be granted.

Respectfully submitted,

Robert A. Ravitz

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Oklahoma City, Oklahoma 73102
(405) 236-2727, ext. 582

COUNSEL FOR PETITIONER

IN THE SUPREME COURT OF THE UNITED STATES

ROBYN LEROY PARKS,

Petitioner,

v.

STATE OF OKLAHOMA,

Respondent.

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SUPREME COURT, U.S.

ORIGINAL

AFFIDAVIT IN SUPPORT OF MOTION
TO PROCEED IN FORMA PAUPERIS

I, ROBYN LEROY PARKS, being first duly sworn, state that I am Petitioner in the above entitled case; that in support of my motion to proceed without being required to pay fees, costs, or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I was previously granted leave to proceed without costs, on grounds of poverty, during proceedings on this case in the Oklahoma Court of Criminal Appeals.

I further swear that the responses which I have made to the questions below relating to my ability to pay the cost of prosecuting the appeal are true:

1. Are you presently employed?

Answer: No, I am presently in the custody of the Oklahoma Department of Corrections, serving the sentence for which I am petitioning the Court for review. I have been imprisoned since 11-17-78.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest dividends, or other sources?

Answer: No.

3. Do you own any cash or checking or savings account?

Answer: Yes, my institutional account currently contains \$ 23.53 .

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)?

Answer: No.

5. List the persons who are dependent upon you for support and state your relationship to these persons.

Answer: None.

I understand that a false statement or answer to any questions in this Affidavit will subject me to penalties for perjury.

Robyn L. Parks
ROBYN LEROY PARKS

STATE OF OKLAHOMA)
) SS:
COUNTY OF PITTSBURG)

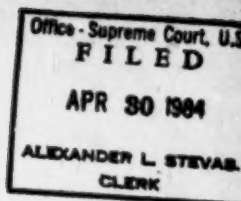
Subscribed and sworn to before me on this 16 day of March, 1984.

James C. Eastham
Notary Public

My Commission Expires:

6-25-85

No. 83-6453



IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ROBYN LEROY PARKS,

Petitioner,

-vs-

STATE OF OKLAHOMA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEY GENERAL OF OKLAHOMA

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ASSISTANT ATTORNEY GENERAL
CHIEF, CRIMINAL/FEDERAL DIVISIONS

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ATTORNEYS FOR RESPONDENT

April, 1984

QUESTIONS PRESENTED FOR REVIEW

1. Whether a hearing in state court is constitutionally required whenever a criminal defendant alleges that he did not receive the effective assistance of counsel.

2. Whether, when the record reveals that the Petitioner's attorney performed within the competence demanded of attorneys in criminal cases, the standard applied, which was the "mockery of justice" test, violated the United States Constitution.

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PROPOSITION I

THE TRIAL TRANSCRIPT REVEALS THAT THE PETITIONER WAS EFFECTIVELY REPRESENTED AT TRIAL AND THEREFORE WAS NOT DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND WAS NOT EN- TITLED TO AN EVIDENTIARY HEARING ON THAT ISSUE.	5
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PROPOSITION II

THE APPROPRIATE STANDARD WAS USED BY THE OKLAHOMA COURT OF CRIMINAL APPEALS TO EVALUATE TRIAL COUNSEL'S PERFORMANCE.	8
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Cases Cited

Beckham v. Wainwright, 639 F.2d 262 (11th Cir. 1981)	6, 9
Dyer v. Crisp, 613 F.2d 275 (10th Cir. 1980)	6
Eddings v. Oklahoma, 455 U.S. 104 (1982)	7
Holloway v. Arkansas, 435 U.S. 475 (1978)	5
Jackson v. Denno, 378 U.S. 368 (1964)	5
Johnson v. State, 620 P.2d 1311 (Okla.Cr. 1980)	6
McMann v. Richardson, 397 U.S. 759 (1970)	6, 7, 8
Parks v. Oklahoma, 103 S. Ct. 800 (1983)	1
Parks v. State, 651 P.2d 686 (Okla.Cr. 1982)	1, 5
Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983)	6
Strickland v. Washington, 693 F.2d 1243 (5th Cir. Unit B 1982) (en banc), <u>cert. granted</u> , 103 S. Ct. 2451 (1983) (No. 82-1554)	8
Tollett v. Henderson, 411 U.S. 258 (1973)	8
Watkins v. Sowders, 449 U.S. 341 (1981)	5

Statutes Cited

21 O.S.Supp.1976, § 701.7	2, 4
21 O.S.Supp.1976, § 701.9	2
21 O.S.Supp.1976, § 701.10	2, 3
21 O.S.Supp.1976, § 701.11	3
21 O.S.Supp.1976, § 701.12	3
21 O.S.Supp.1976, § 701.12(5)	5
21 O.S.Supp.1976, § 701.13	3, 4
28 U.S.C. § 1257(3)	1

Constitutional Provisions Cited

U.S. Const., Amend. VI	1
U.S. Const., Amend. XIV	2

Other Authorities Cited

Goodpaster, <u>The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases</u> , 58 New York Law Rev. 299 (1983)	6, 7, 8
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ROBYN LEROY PARKS,

Petitioner,

-vs-

STATE OF OKLAHOMA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

Respondent, the State of Oklahoma, by and through Michael C. Turpen, Attorney General of the State of Oklahoma, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the judgment of the Court of Criminal Appeals entered in this case on January 25, 1984.

OPINIONS BELOW

The Opinion of the Oklahoma Court of Criminal Appeals is an unpublished order, which was attached to the Petitioner's Petition as Appendix A. The order denying the Petitioner's post-conviction relief application in the trial court is an unpublished opinion, attached to the Petitioner's Petition as Appendix B.

The Oklahoma Court of Criminal Appeals had previously affirmed the Petitioner's conviction in Parks v. State, 651 P.2d 686 (Okla. Cr. 1982), and this Court denied certiorari on January 17, 1983, at 103 S. Ct. 800 (1983).

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been

previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides in part:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Title 21 O.S.Supp.1976, § 701.7, provided in part:

"A. A person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof."

"B. A person also commits the crime of murder in the first degree when he takes the life of a human being, regardless of malice, in the commission of forcible rape, robbery with a dangerous weapon, kidnapping, escape from lawful custody, first degree burglary or first degree arson."

Title 21 O.S.Supp.1976, § 701.9, provided in part:

"A. A person who is convicted of or pleads guilty or nolo contendere to murder in the first degree shall be punished by death or by imprisonment for life."

Title 21 O.S.Supp.1976, § 701.10, provided as follows:

"Upon conviction or adjudication of guilt of a defendant of murder in the first degree, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable without presentence investigation. If the trial jury has been waived by the defendant and the state, or if the defendant pleaded guilty or nolo contendere, the sentencing proceeding shall be conducted before the court. In the sentencing proceeding, evidence may be presented as to any mitigating circumstances or as to any of the aggravating circumstances enumerated in this act. Only such evidence in aggravation as the state has made known to the defendant prior to his trial shall be admissible. However, this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of

the United States or of the State of Oklahoma. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death."

Title 21 O.S.Supp.1976, § 701.11, provided as follows:

"In the sentencing proceeding, the statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that any such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life."

Title 21 O.S.Supp.1976, § 701.12, provided as follows:

"Aggravating circumstances shall be:

"1. The defendant was previously convicted of a felony involving the use or threat of violence to the person;

"2. The defendant knowingly created a great risk of death to more than one person;

"3. The person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;

"4. The murder was especially heinous, atrocious, or cruel;

"5. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution;

"6. The murder was committed by a person while serving a sentence of imprisonment on conviction of a felony; or

"7. The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."

Title 21 O.S.Supp.1976, § 701.13, provided as follows:

"A. Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Oklahoma Court of Criminal Appeals. The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Oklahoma Court of

Criminal Appeals together with a notice prepared by a clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Oklahoma Court of Criminal Appeals."

"B. The Oklahoma Court of Criminal Appeals shall consider the punishment as well as any errors enumerated by way of appeal.

"C. With regard to the sentence, the court shall determine:

"1. Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

"2. Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in this act; and

"3. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

"D. Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

"E. The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

"1. Affirm the sentence of death; or

"2. Set the sentence aside and remand the case for modification of the sentence to imprisonment for life.

"F. The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence."

STATEMENT OF THE CASE

The Petitioner, Robyn Leroy Parks (hereinafter referred to as "Petitioner"), was convicted of one count of Murder in the First Degree in the District Court of Oklahoma County in violation of 21 O.S.Supp.1976, § 701.7. The Petitioner was convicted by a jury which then heard evidence in the second stage of the trial

and found the existence of one aggravating circumstance and sentenced the Petitioner to death.

The facts of the case are set forth in detail in the opinion of the Oklahoma Court of Criminal Appeals reported as Parks v. State, 651 P.2d 686 (Okl.Cr. 1982). Briefly stated, the Petitioner used a stolen credit card to pay for gasoline at a service station. When he noticed the station attendant, Abdullah Ibrahim, writing the tag number of his vehicle, Parks feared that Ibrahim would report the stolen card to the police. The Petitioner then fatally shot Ibrahim once in the chest and left the scene.

REASONS WHY THE WRIT SHOULD BE DENIED

PROPOSITION I

THE TRIAL TRANSCRIPT REVEALS THAT THE PETITIONER WAS EFFECTIVELY REPRESENTED AT TRIAL AND THEREFORE WAS NOT DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND WAS NOT ENTITLED TO AN EVIDENTIARY HEARING ON THAT ISSUE.

The Petitioner contends that he should have received an evidentiary hearing in state court on the issue of whether he received the effective assistance of counsel in this case.

No authority has been cited to support the contention that a state is required to conduct an evidentiary hearing to consider a claim of ineffective representation by trial counsel. The Supreme Court has mandated hearings in state courts on certain issues in criminal proceedings. Jackson v. Denno, 378 U.S. 368 (1964) (hearing required to determine voluntariness of confession); Holloway v. Arkansas, 435 U.S. 475, 487 (1978) (trial court under duty to examine defense attorney's contention of existence of conflict of interest).

However, on other issues the Court has reviewed the facts of a particular case to determine whether constitutional error was committed by failing to hold a hearing at the defendant's request. In Watkins v. Sowders, 449 U.S. 341 (1981), the Court refused to adopt a per se rule requiring a hearing outside the presence of

¹ The jury found that the Petitioner committed the murder for the purpose of avoiding or preventing a lawful arrest or prosecution. 21 O.S.Supp.1976, § 701.12(5).

the jury to determine the admissibility of eyewitness identification testimony. In McMann v. Richardson, 397 U.S. 759, 771 (1970), the Court held that a defendant who alleges that he pleaded guilty because of a prior coerced confession is not, without more, entitled to a hearing on his federal petition for writ of habeas corpus.

The Petitioner claims that the trial attorney was incompetent during the penalty phase of the capital trial because he was physically ill, failed to present mitigating evidence and failed to properly prepare for the sentencing stage. An evaluation of defense counsel's performance based upon the trial record reveals that defense counsel acted competently in accordance with applicable case law and the analytical framework set forth in Goodpaster, The Trial for Life: Effective Assistance of Counsel In Death Penalty Cases, 58 New York Law Rev. 299 (1983).

This Court has not articulated a uniform standard for measuring the effectiveness of counsel. The Tenth Circuit Court of Appeals in Dyer v. Crisp, 613 F.2d 275 (10th Cir. 1980), complied with the majority of circuits to hold that the Sixth Amendment required assistance of counsel to be measured against a standard higher than "sham and mockery." The Oklahoma Court of Criminal Appeals in Johnson v. State, 620 P.2d 1311 (Okla. Cr. 1980), adopted the Dyer standard of reasonably competent assistance of counsel. A defense attorney's actions should be viewed in the context of his overall performance, rather than dissection of his advocacy and second-guessing of each individual action. Stanley v. Zant, 697 F.2d 955, 962 (11th Cir. 1983); Beckham v. Wainwright, 639 F.2d 262, 265 (11th Cir. 1981). Thus, the competency question could be framed as follows: given what counsel knew or reasonably should have known, would a reasonably competent attorney have made the choice that trial counsel made? Goodpaster, supra, at 344. Upon consideration of the trial record and the Petitioner's failure to produce any additional mitigating evidence which defense counsel failed to obtain, the Respondent submits that Petitioner has failed to meet the burden of proving that defense counsel acted incompetently during the penalty stage of the capital trial.

Notwithstanding the imposition of the death sentence, defense counsel's presentation during the penalty phase of trial contained each of the four elements of the mitigating case discussed by Goodpaster. First, defense counsel, through examination of the Petitioner's father (Tr. 667-72) and closing argument (Tr. 709), attempted to "portray the [Petitioner] as a human being with positive qualities." Goodpaster, *supra*, at 335. Indeed, the foundation for this portrayal was laid during the first stage of the trial through defense counsel's examination of the Petitioner (Tr. 464) and in the closing statement (Tr. 579-612).

Second, defense counsel attempted "to show that the [Petitioner's] capital crimes are humanly understandable in light of his past history and the unique circumstances affecting his formative development, that he is not solely responsible for what he is." *Id.*, at 335; *See, Eddings v. Oklahoma*, 455 U.S. 104 (1982). A significant illustration of this element is defense counsel's examination of the Petitioner's father, a former convicted felon who was gainfully employed at the time of trial (Tr. 667-71, 681-83). This element of mitigation is also illustrated by defense counsel's discussion of the impact on the Petitioner of his family life, economic situation, and general racial tensions during closing argument at the second stage of trial (Tr. 715).

Third, the fifteen-page closing statement (Tr. 708-23) presented by defense counsel during the penalty stage is clearly an articulate and carefully prepared attempt "to try the death penalty itself by presenting evidence and argument against its application in the particular case." Goodpaster, *supra*, at 336. Defense counsel recounted his experiences with death during his military service in Vietnam and his involvement in the enactment of the death penalty statute during his tenure as a legislator. Moreover, defense counsel questioned with specificity the existence of any of the three proposed aggravating circumstances, cited the Petitioner's father as an illustration of a successfully rehabilitated convict, and generally made a strong plea in opposition to the death penalty.

Finally, the jury's failure to find as an aggravating circumstance that the Petitioner might in the future commit criminal acts of violence in part attests to defense counsel's investigation and preparation of a rebuttal case against any evidence of other crimes or circumstances in the Petitioner's background which the prosecution attempted to introduce in aggravation at the penalty phase. Id., at 337. Skillful cross-examination of the primary prosecution witness during the penalty stage (Tr. 689-93), supported by testimony elicited from the Petitioner's father (Tr. 669-70) and statements during closing argument (Tr. 714), indicate that defense counsel recognized the importance of the penalty stage proceedings and had prepared accordingly. The trial record herein may be contrasted with cases where defense counsel, by failing to present evidence or argument, does not successfully shift into the role of advocate during the penalty stage of a capital trial. Id., at 337, and cases cited therein at Note 151.

Thus, since the Petitioner has failed to establish a prima facie case that defense counsel was incompetent, it is not necessary to examine whether counsel's performance was prejudicial to the Petitioner. See, Strickland v. Washington, 693 F.2d 1243 (5th Cir. Unit B 1982) (en banc), cert. granted, 103 S. Ct. 2451 (1983) (No. 82-1554).

PROPOSITION II

THE APPROPRIATE STANDARD WAS USED BY THE
OKLAHOMA COURT OF CRIMINAL APPEALS TO EVALU-
ATE TRIAL COUNSEL'S PERFORMANCE.

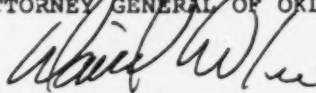
The Petitioner suggests that the Oklahoma Court of Criminal Appeals improperly applied the "sham and mockery" standard in its evaluation of trial counsel's performance on appeal of the denial of post-conviction relief. This assertion is without merit because, as stated above, this Court has not expressed a uniform national standard for competency of counsel in criminal cases because lower courts. Furthermore, an independent review of the record reveals that the trial counsel performed "'within the range of competence demanded of attorneys in criminal cases.'" Tollett v. Henderson, 411 U.S. 258, 266 (1973); McMann v. Richardson,

CONCLUSION

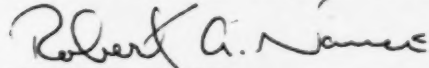
For the reasons stated, it is respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

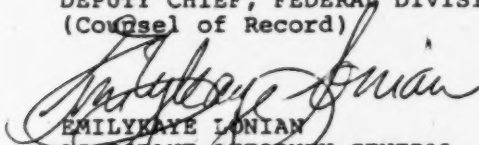
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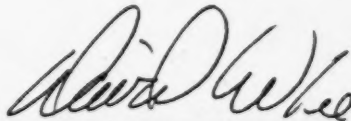
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ATTORNEYS FOR RESPONDENTS

CERTIFICATE OF MAILING

On this 26th day of April, 1984, a true and correct copy of the foregoing was mailed, postage prepaid, to:

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First Assistant Public Defender
409 County Office Building
320 Robert S. Kerr
Oklahoma City, OK 73102



DAVID W. LEE

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